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IN THE CIRCUIT COURT OF NANSEMOND COUNTY.

GAY v. COMMONWEALTH.

Intoxicating Liquors—Sale of "Mead"—Construction of Statute.—

The sale of "mead," a malt beverage containing less than $2\frac{1}{4}$ per cent. of alcohol and non-intoxicating, is prohibited, in those localities which have declared against the sale of intoxicating liquors, by § 587 of Pollard's Code.

Same—Same—Same—Repeal of Statutes.—Nor is § 587 of Pollard's Code repealed by § 30 of the Byrd Law.

Judge James L. McLemore presiding.

Joe Gay, the plaintiff in error, was convicted by a justice of the peace of Nansemond County of "unlawfully selling mead, a malt beverage containing less than $2\frac{1}{4}$ per cent. alcohol and non-intoxicating."

Upon appeal to the Circuit Court plaintiff in error, by counsel moved the Court to quash the warrant on the ground that it charged no offence under the laws of Virginia.

In support of this motion it was argued:

1st. That the sale of a non-intoxicating malt liquor was not prohibited by section 587 of Pollard's Code.

2nd. That if such sale was prohibited said section was repealed by section 30 of the Byrd law.

So much of section 587 as is material to be considered is as follows:

"If any person sells any wine, spirituous, or malt liquors, or any mixture thereof, in any county, magisterial district, or corporation, voting, as hereinbefore provided, against the sale of liquor and the granting of liquor license therein, he shall be liable to all the penalties imposed for the sale of spirituous liquors or ardent spirits without a license."

Judge McLemore delivered an oral opinion and said in part as follows: That the 1st question appeared to be settled by the recent case of *Commonwealth v. Goodwyn*, 64 S. E. 54, in which the Court held that a malt beverage which contained less than $2\frac{1}{4}$ per cent. of alcohol and which was non-intoxicating was embraced within the meaning of an act which prohibited the sale, except upon certain conditions, of ardent spirits, malt liquors or any mixture thereof, within the corporate limits of the town of Mannassas.

The language of Judge Buchanan in delivering the opinion of the Court in the *Goodwyn* case is as follows:

"It seems to be well settled that the general term "malt

liquors" includes both intoxicating and non-intoxicating malt liquors.

Black, in his article on intoxicating liquors in 23 Cyc. 41, 60, says that, "If the statute specifically forbids the unlicensed sale of malt liquors, the question of the intoxicating properties of the liquor sold is immaterial. It is only necessary to determine whether it was a malt liquor." *Eaves v. State*, 113 Ga. 749, 39 S. E. 318, 321.

See also, the following cases, where it was held that if the law prohibits or regulates the sale of "cider" by name, without any qualifying word, it applies to all cider, without regard to its intoxicating qualities. *State v. Roach*, 75 Me. 123; *Commonwealth v. Dean*, 14 Grav (Mass.) 99; *State v. Spalding*, 61 Vt. 505, 17 Atl. 844.

In *State v. Kauffman*, 68 Ohio St. 635, 67 N. E. 1062, it was held that a malt beverage which contained not less than 2¼ per cent. alcohol, and which was not intoxicating, was embraced within the meaning of an act which related to trafficking in spirituous, vinous, malt, and intoxicating liquors. See *U. S. v. Ducournau* (C. C.), 54 Fed. 138, 139; *U. S. v. Cohn*, 2 Ind. T. 475, 52 S. W. 38.

Judge McLemore also based his opinion upon the fact that section 587 when first enacted prohibited the sale of *all intoxicating liquors* and that the revisors of the Code of 1887 changed it to read "wine, spirituous, malt liquors, or any mixture thereof" thereby indicating an intention to include something more than intoxicating liquors.

In reply to the contention that section 587 was repealed by the Byrd law Judge McLemore said:

"The repeal of a statute by implication is not favored by the Courts. It is held to be a reasonable presumption that the Legislature did not intend to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention." *Eureka Club v. Commonwealth*, 105 Va. 564, 54 S. E. 470; *S. & W. Ry. Co. v. Commonwealth*, 104 Va. 314, 51 S. E. 824.

After referring to the fact that the Byrd law expressly repealed several acts of the Legislature while section 587 was not expressly mentioned, Judge McLemore said that to his mind the statutes did not necessarily conflict as the purpose of the Byrd law is to regulate the *traffic* in ardent spirits while section 587 is intended to govern territory where the traffic is under all conditions illegal; and that as the Byrd law defines ardent spirits *within the meaning of that act*, it is not an unreasonable con-

struction to hold that the Legislature intended to permit the sale without the payment of a tax on malt liquors containing less than $2\frac{1}{4}$ per cent. alcohol where other spirits are sold, and yet prohibit its sale in those localities which have declared against the sale of intoxicating liquors. The Court, therefore, held that section 587 prohibited the sale of "mead" in local option territory and that said section was not repealed by the Byrd law.

JAMES N. BURGESS.

Note.

See note to *Commonwealth v. Goodwin*, 15 Va. Law Reg. 281.